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IN THE

Supreme Court of The United States

OCTOBER TERM 1965

No. 867

CLAIRE B. COHEN, ABRAHAM M. GROSSMAN, PAULINE GROSSMAN, WILLIAM CHABINSKY and PEARL CHABINSKY,

Petitioners

v.

LAZARUS JOSEPH and DAVID I. SHIVITZ, as trustees of PRESTON HOUSE SIRE PLAN, INC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD COHEN
Counsel for Petitioners

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on October 6, 1965.

Citations to Opinions Below

The opinion of the Circuit Court of Appeals is unreported and states in its entirety "Motion to dismiss appeals granted." (R. 48a)

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether bondholders and stockholders of a corporation in a Chapter X Reorganization Bankruptcy Proceedings who voted against the Trustees' plan of reorganization and who appeared in Court in person at the confirmation hearing and voiced objections thereto are so dilatory in their actions so as to lose their standing to appeal the U.S. District Court order confirming the Trustees' plan of reorganization.

2. Whether the Court of Appeals could, on a motion to dismiss the appeals, summarily dismiss the appeals of these bondholders and stockholders without first ordering a hearing or trial when the Trustees' allegations as to their dilatoriness were unresolved questions of fact which were disputed and denied by these bondholders and stockholders.

3. Whether the highest bidder in a judicial sale has standing to appeal the arbitrary and improper rejection of her bid.

4. Whether a U. S. District Court, in a proceedings to sell a bankrupt's real property, could properly rule that a lesser bidder be allowed to equal (not pay more than) a higher bid made by another and that once the higher bid was equalled that no other, better, additional bids be allowed or accepted.

Petitioners' Complaint

The Petitioners complain that the Trustees and the U. S. District Court have failed to sell the bankrupt's real property to the highest bidder at the sale, and that they have

failed to obtain for the bankrupt's creditors and investors the highest price available for this property.

Purpose of Appeal

To have the Supreme Court of the United States reverse the order of the Court of Appeals which dismissed Petitioners' appeals so they can continue to prosecute same, or in the alternative, for the Court to set aside the prior sale and order that a new sale be held which will be fair and equitable to all, or in the alternative, to decree Mrs. Cohen as being the highest bidder at the sale and the successful purchaser of the bankrupt's property.

Statement

The Sire Plan is a real estate syndication organized in New York State for the purpose of selling shares in real property investments to the small investor. The parent corporation, The Sire Plan, Inc. and its affiliate corporations have almost 10,000 investors (R. 125a). The Preston House Sire Plan, Inc., one of the affiliates, is a corporation which was organized by its parent for the purpose of acquiring title to a centrally air-conditioned, 10 year old, four story elevator apartment house located at 444 Middle Neck Road, Great Neck, N. Y., and to make a public offering of its securities to finance the acquisition of such property (R. 166-167). It is this debtor's real property which we are concerned with here. The building contains 51 apartments, 203 rooms, 35 indoor garage spaces and is on a plot of land approximately 400 feet in width, fronting on Middle Neck Road and 100 feet in depth (R. 167). The building is fully rented (R. 653, 666). It is well constructed, has large rooms and is located in one of the finest neighborhoods in the United States. It is an excellent real estate investment. Preston House Sire Plan, Inc. acquired title to the property

on June 30, 1958 and the cost of the property to the investors, including brokerage commissions and other expenses was approximately $735,000.00 of which $280,000.00 was contributed by the investors in cash and the balance of $455,000.00 paid by accepting title subject to a first mortgage lien held by a New York savings bank (R. 168). Preferred stock and debentures were offered to the public and fully subscribed (R. 167). Together with Petitioners Grossman and Chabinsky, who are original bondholders and stockholders in the debtor, there are approximately 266 public investors (R. 167) who immediately stand to gain or lose from the manner in which the debtor's real property is sold. In addition to these investors, the debtor has numerous creditors who also stand to lose or gain from the manner in which the debtor's property is sold, including the United States government which has filed a large claim for taxes (R. 644-645).

On February 16, 1963, the debtor, Preston House Sire Plan, Inc., filed a voluntary petition in the U. S. District Court, Southern District of New York, praying for the reorganization of the corporation pursuant to Chapter X of the Bankruptcy Act (R. 171). The petition was approved the same day (R. 171-172) and the Trustees, without a hearing, were appointed by the Court the same day and they immediately assumed the operation and management of the real property owned by the debtor (R. 182). The Trustees are both lawyers.

On November 30, 1964 Petitioner Cohen's attorney conferred with the Trustees' attorney for the purpose of purchasing the debtor's real property. At that time Petitioner's attorney was told that in a private sale a prior offer had been submitted by a Dr. Weinraub, which offer had not yet been approved by the District Court. He was also told that Mrs. Cohen's proposed offer of $100,000.00 in cash subject to two mortgages appeared to be in excess of Dr. Weinraub's offer and that if Mrs. Cohen made such an offer to the Trustees in writing accompanied by a deposit

of $10,000.00, the Trustees would submit the offer to the District Court for its consideration and approval.

On December 2, 1964 Mrs. Cohen made and mailed such a written offer to the Trustees together with the deposit of $10,000.00 (R. 180a).

A hearing was held before the U. S. District Court on December 16, 1964 to consider the new offer made (R. 62-130). At the hearing, Mrs. Cohen's offer was increased to $101,000.00 (R. 120, 182a). At the conclusion of the hearing when it appeared that Mrs. Cohen's offer was the best offer submitted, Irving Stoltz, Esq., the attorney representing Dr. Weinraub, asked the Court for the right to amend Dr. Weinraub's offer to meet (not pay more than) the better offer (R. 123-125). The Court granted him this right (R. 125 and 241). The Court then ruled that no other offers would be accepted if made by anyone else (R. 129). Mr. Lapidus, an attorney with the Securities and Exchange Commission, objected, stating that if Dr. Weinraub matched the better offer, the Trustees would be left with two equal offers "from which they would have nothing to choose among them" (R. 130). The Court said if this were so, the Trustees should so recommend and the Court would make the choice (R. 130). Although Petitioner's attorney did not know it at that time, a reading of a previous record concerning a hearing which took place on September 21, 1964 reveals that a close friendship exists between the District Judge and Mr. Stoltz and indicate which equal offer the District Judge will choose.

> "The Court: All right, now let me tell you, Mr. Stolz and I go back to Stuyvesant High School together, and he is a past president of my Bar Association" (R. 512).

No prior relationship exists between the District Judge and Petitioner or her attorney.

On December 28, 1964, after reviewing all the offers

made, the Trustees recommended to the Court that the offer submitted by Mrs. Cohen be approved by the Court (R. 275).

On January 8, 1965 Petitioner's attorney was told in Trustees' attorney's office that the Trustees considered Mrs. Cohen's offer to be $15,000.00 better than Dr. Weinraub's offer and that conversations were being had with Mr. Stolz to determine if Dr. Weinraub would increase his offer by that amount. In the event he did, then the Trustees were prepared to recommend it to the District Court as being equal (not better) with Mrs. Cohen's offer. Petitioner's attorney argued at that time that Mrs. Cohen's offer was in fact $41,000.00 superior to Dr. Weinraub's original offer and could, under certain conditions, be considered to be actually $71,000.00 superior to Dr. Weinraub's offer. He further urged that if Dr. Weinraub increased his offer by only $15,000.00, Mrs. Cohen's offer would still be better than his.

On January 11, 1965, Petitioner's attorney received a copy of a letter written by Trustees' attorney to the District Court in which the Trustees advised the Court that Dr. Weinraub has increased his prior offer by $9,000.00 (not $15,000) and that the Trustees recommend the Weinraub offer as now being equal with Mrs. Cohen's offer (R. 285).

On January 18, 1965, before the District Judge had approved either offer, Petitioner's attorney conferred with Trustees' attorney for the purpose of regaining for Mrs. Cohen the Trustees' recommendation to the Court that the Cohen offer once again be approved; and upon Trustees' attorney's statements and representations that Trustees considered both offers as now being equal and that if Mrs. Cohen increased her prior offer by $5,000.00, the Trustees would recommend this increased amended offer to the District Court, Petitioner's attorney increased Mrs. Cohen's offer of $101,000.00 in cash for the debtor's property to $106,000.00 in cash (R. 298-299).

However, on February 2, 1965, Trustees' attorney wrote the District Judge that he conferred with Petitioner's attorney on January 18, 1965 but that Petitioner's attorney's sole purpose in conferring with him was to convince Trustees' attorney that Mrs. Cohen's $101,000.00 offer is better than the Weinraub offer and that the Trustees should change their recommendation (R. 288). Nothing was said about Mrs. Cohen's amended increased offer of $106,000.00. The Weinraub offer was then again recommended to the Court by the Trustees (R. 290).

On February 4, 1965 Petitioner's attorney telephoned the District Judge, spoke to his law secretary and told him about the increased $5,000.00 offer made by Mrs. Cohen and asked for the opportunity to inform the District Court thereof by letter. The secretary, after inquiring of the District Judge, said the request was refused, that the Judge was working on his opinion relating to this sale and had all the information he needed.

On February 8, 1965, the District Court rendered its opinion in which it approved the sale of the property to Dr. Weinraub (R. 242-290). The opinion contained the statement by the Court that on February 3, 1965 it had been informed by the Trustees that further conferences had been held with Petitioner's attorney, but that Petitioner's attorney refused to increase Mrs. Cohen's offer (R. 260). Nothing was said about Mrs. Cohen's $106,000.00 increased offer. Since this statement did not represent the true facts of what occurred, Petitioner decided to make a motion to amend the Court's decision (R. 296-301).

The motion was instituted on February 13, 1965 (R. 296). It was made returnable in the District Court motion part on March 2, 1965 and the notice of motion contained the request that at the call of the calendar the motion be referred to the District Judge who rendered the opinion which Petitioner was moving to have amended (R. 296). Attached to the motion papers was a letter executed by Mrs.

Cohen confirming her attorney's increase of her offer by $5,000.00 to $106,000.00 (R. 306). The purpose of the motion was to amend the Court's opinion to include the increased offer so that same would be considered and acted upon by the Trustees and the District Court. Instead of considering and acting upon the increased offer, the Trustees' attorney, the Trustees and the Court proceeded to dispute the fact that the increased offer had been made at all. A conflict erupted between two members of the Bar as to which one was telling the truth before a District Judge who knew Trustees and their attorney for many years and who appointed them to their respective positions in these proceedings, and between Petitioner's attorney, who was a stranger to the other participants. In the meantime the increased offer and whatever benefit it would provide for the debtor, its creditors and its investors was ignored completely.

On the return date of the motion same was referred to the District Judge who rendered the opinion where the following occurred:

"The Court: Thank you. Before I hear the opposition, I will take up the two motions that were referred here from 506. Have the motion papers come up?

Mr. Fitzgerald: No, Your Honor.

The Court: Well, we have a copy of one of them. Mr. Cohen, you have a motion returnable here, in which you ask—

Mr. Cohen: I have asked, Your Honor, for the Court to amend its decision, its opinion dated February 8, 1965.

The Court: All right, I will have to hold a hearing on that. The motion will be heard on March 8, 1965, in this room. There are other motions on that day, but I will set this one down for the opening

hours, ten-thirty. I don't know when it will be reached.

Mr. Cohen: Your Honor, up to this moment I do not know if there is any opposition to this motion. I haven't been served with any papers.

The Court: *I will tell you there is. The trustees have indicated to me that there is, so disabuse your mind of that. That is why there is going to be a hearing. I am not taking any of the accusations made in these papers on a mere affidavit. Whoever has made the accusations is going to swear to them and be cross-examined.''* (Emphasis supplied) (R. 361-363)

These statements made by the District Judge show that ex parte conversations were had between the Trustees and the District Judge in a pending contested proceedings with the intent to influence the Court in its judicial action. These ex parte conversations are in direct violation of Sec. 3 of *The Canons of Professional Ethics of the American Bar Association* and Sec. 17 of *The Canons of Judicial Ethics of the American Bar Association.* Although no papers in opposition were before the Court and no oral argument was had, the Court had already arrived at the conclusion that the allegations in the moving papers made by Petitioner's attorney were false. It has never been adequately explained who gave the District Judge a copy of Petitioner's motion papers before the original motion papers were brought to the Court from the Motion Part. At first, in an affidavit sworn to by Trustees' attorney he denied that he or any member of his firm ever gave these motion papers to the Court or to anyone associated with the Court (R. 123a). However, a month later it was revealed in another affidavit, again sworn to by Trustees' attorney, that a member of his firm did give *photocopies* of the motion papers to the Judge's law clerk (R. 136a-143a). However, Petitioners' attorney, who saw the papers in the Court's

possession, disputed that the papers the Court had were *photocopies,* but stated they were in fact the same carbon copies of the papers Petitioner's attorney prepared in his office and served upon the Trustees' attorneys and others in these proceedings (R. 188a-191a).

On March 5, 1965 Trustees' attorney served an answer to the motion in which he denied that conversations were had with Petitioner's attorney on January 18, 1965 in which Mrs. Cohen's offer had been increased by $5,000.00 (R. 312).

On March 8, 1965, the adjourned date of the motion, (R. 471-492) Petitioner's attorney asked the District Judge to refer the contested issue of fact of whether the increased offer had actually been made to an impartial Judge for trial (R. 484-485). The Court refused. When Petitioner's attorney attempted to give the Court the reason for asking for the referral, the Court said it was not interested. The Petitioner's motion was dismissed (R. 489-490).

On March 19, 1965, the Trustees mailed to all the creditors of the debtor entitled to vote thereon a Notice and Letter of Transmittal in which they sought the creditors' approval of the sale of the property to Dr. Weinraub (R. 348). In spite of the fact that Mrs. Cohen had been and still continues to be an ardent and eager bidder for the debtor's real property, the Trustees deliberately failed to mention in their Notice and Letter of Transmittal that Mrs. Cohen had made a prior offer which the Trustees had previously recommended to the Court, nor did they mention her increased offer which they now refused to consider. However, they did tell the creditors that the alternative to approving the sale of the property to Dr. Weinraub was an auction or foreclosure sale "which may yield no return to the debtor estate" (R. 348-349). The true fact is that by approving the Weinraub offer, where the Estate will receive only $59,000.00 in cash, the creditors will still receive nothing because after administrative expenses and

taxes amounting to $56,778.84 are paid there will be nothing left over (R. 644-645). There will not even be enough money to pay the taxes in full. Yet eager purchasers, of which Mrs. Cohen is one, have in the past, and still remain ready to pay more for the debtor's property than Dr. Weinraub wants to pay for it, but their offers continue to be resisted and rejected. These facts the Trustees have deliberately withheld from the creditors.

Petitioners Abraham Grossman, a blind veteran (R. 666) and Pauline Grossman, his wife, also blind, (R. 171a) together with Petitioners William Chabinsky and Pearl Chabinsky, all original investors (bondholders and stockholders) of the debtor, in accordance with the instructions given them on the ballot supplied to them by the Trustees (R. 346), voted against the sale of the property to Dr. Weinraub. They also all, except Mrs. Grossman, appeared in the Courtroom on May 17, 1965 at the hearing held to confirm the sale of the property to Dr. Weinraub, and Mr. Grossman voiced his objections thereto (R. 666).

Appeals were taken from the three orders, the order approving the sale, the order dismissing the motion made to amend the Court's opinion to include Mrs. Cohen's increased offer, and from the order confirming the sale.

After Petitioners filed their brief in the Court of Appeals, the Trustees, on August 11, 1965, made a motion to dismiss Petitioners' appeals (R. 29a-47a) and they accompanied this motion with another motion to stay their filing an answering brief until after the motion to dismiss the appeals was heard (R. 49a-73a). Petitioners opposed the motion to stay the filing of the answering brief and in an opposing affidavit set forth much that is stated here together with a recommendation that an investigation be instituted by the Court of Appeals to inquire into the conduct of all the parties here and into the manner in which the debtor's property was being delivered by the Trustees.

and the Court to Dr. Weinraub at the price Dr. Weinraub wants to pay for it and not at the price it can and should bring (R. 78a-111a). The answering affidavit repeated the allegations that Petitioner's attorney increased Mrs. Cohen's offer by $5,000.00 on January 18, 1965, that the Trustees failed to announce this increased offer to the Court, but that instead, they represented to the Court that Petitioner's attorney refused to increase Mrs. Cohen's offer (R. 85a, 260). Trustees' attorney replied thereto by affidavit sworn to August 18, 1965 (R. 117a-127a) *in which for the first time he came forward and admitted that Petitioner's attorney had in fact made an increased offer on January 18, 1965* (R. 120a), but he attempts to hide behind the distinction that the offer was conditional rather than unconditional and states that he "... immediately rejected Cohen's conditional offer" (R. 120a). Petitioner or her attorney never denied the offer was conditional. It was made to regain the Trustees' recommendation. In fact on Febraury 13, 1965 in the motion papers submitted to amend the Court's opinion Petitioner's attorney stated clearly that the increased offer was made to regain the Trustees' recommendation (R. 299). However, the Trustees' attorney, in his answer, denied any increased offer had ever been made at all, whether conditional or not (R. 312). Petitioners contend that there was a duty imposed upon Trustees' attorney to inform the Trustees and the Court of the increased offer irrespective of whether it was conditional or not, and the Trustees and the Court had a duty to now consider this increased offer and whether it would be in the best interests of the bankrupt estate. Petitioners also contend that there is nothing improper with the Trustees recommending or being on the side of the bidder who offers to pay the highest price for the debtor's property in a bankruptcy sale. They do feel however, that it is improper for the Trustees to be on the side of the bidder who does not offer to pay the highest price for the debtor's property, and this, in essence, is what this appeal is all about.

The motion to dismiss the Petitioners' appeals was granted by the Court of Appeals on October 6, 1965 (R. 48a). Mrs. Cohen's appeals were dismissed because the Court below held that she lacked standing to appeal (R. 193a). The other Petitioners' appeals were dismissed because the Court below held that they were dilatory (R. 193a).

Reasons for Granting the Writ

1. The decision of the Court below in dismissing the appeals of Mrs. Cohen, the highest bidder in the bankruptcy sale upon the grounds that she has no standing to appeal is in direct conflict with *In re Jungmann,* 186 F 302, decided by the Second Circuit Court of Appeals, *In re Williams,* 197 F 1, decided by the Fourth Circuit Court of Appeals, *Jacobsohn* v. *Larkey,* 245 F 538, decided by the Third Circuit Court of Appeals, and *Smith* v. *Saverite Drug Stores,* 178 F 2d 507, decided by the Tenth Circuit Court of Appeals. In all these cases the Courts permitted the highest bidder in a judicial sale to appeal. *In re Jungmann, supra,* the Court said it would make no sound distinction if the sale were at public auction or at a private sale. *In re Williams, supra,* the controversy involved whether Mr. Herd's bid was properly rejected by the trustees. The lesser bidder, on appeal, contended that Mr. Herd, as a matter of law, could not except to the order of the referee. The Fourth Circuit Court of Appeals stated

> "A purchaser or bidder at a master's sale in chancery subjects himself *quod hoc* to the jurisdiction of the Court and can be compelled to perform specifically. It would seem that he must acquire a corresponding right to appeal and claim, at the hands of the Court, such relief as the rules of equity proceedings entitle him to. *Blossom* v. *Rail-*

road Co., 1 Wall 655, 17 L ed. 673; *Delaplaine* v. *Lawrence*, 10 Paige (N.Y.) 602."

2. The U.S. District Court decision is, and consequently the law presently is, that a lesser offeror in a bankruptcy sale may be given the right by the Court to equal a higher offer made by another (R. 241) and at that time the Court may also rule that once the higher offer is equalled, that no one else may submit any other additional better offers for the same property (R. 129). This Court may wish to reverse the District Court decision because same can only tend to discourage and prevent bidding at judicial sales. It is not the first time that these Trustees and the District Judge herein permitted such unfair and preferential treatment to one offeror as against all the other offerors. They also did it in the La Guardia case (R. 125). It seems clear that the continuation of such a decision can lead to all degrees of unfairness and corruption. Such a decision would seem to nullify the prior rule that a trustee who is also a representative of the creditors, has a paramount duty to conserve and advance the interests of the estate entrusted to him. *Eyster* v. *Gaff* 91 U.S. 521, *Matter of Webster Loose Leaf Filing Co.*, 252 Fed. 959. How the Trustees and the District Court could take the competition out of the sale and still hope to advance the interests of the bankrupt and its investors is difficult to understand. Essentially the error the Trustees and the Court made was in accepting less for the bankrupt's property when more was offered.

3. The decision of this Court will directly affect 266 investors of the debtor. It will also directly affect numerous creditors of the debtor including the United States Government which has filed a tax claim for $56,778.84. Since Dr. Weinraub's offer contemplates a cash payment by him of only $59,000.00, it is clear that after administrative expenses there will not be enough to pay the full tax claim,

and nothing else will be left for the other creditors and investors of the debtor. The actual cost of the debtor's property to the various participants herein is as follows:

a) On July 30, 1958 Preston House Sire Plan, Inc. purchased the property from the prior owner and paid (R. 168) $665,006.72

b) The property was syndicated shortly thereafter and the actual cost to the investors was (R. 168) $735,006.72

c) The actual cost to Dr. Weinraub for the property, if the sale to him is sustained is approximately $535,000.00

d) The actual cost to Mrs. Cohen for the property if her present offer is accepted is approximately $570,000.00

The property today is more valuable than it was in 1958. It is clear that if the sale to Dr. Weinraub is sustained he will receive a windfall. He will be the only one to benefit while 266 investors will lose their entire investments, the creditors will receive nothing and the United States Government will only receive a part of the taxes due it. If the prior sale is set aside and another sale is ordered Mrs. Cohen represents to this Court that she will at least make the same bid of $106,000.00 in cash she has heretofore made for the property and if someone offers more, she will increase her offer above that already offered. She never had an opportunity to compete for the property and welcomes same.

4. The prior sale was conducted in such an improper manner as to cause this Court to exercise its supervisory powers to set it aside.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD COHEN
Counsel for Petitioners

APPENDIX

OPINION OF COURT OF APPEALS MADE AND ENTERED ON OCTOBER 6TH, 1965

Motion to dismiss appeals granted. (R.48a)

ORDER OF CIRCUIT COURT OF APPEALS MADE AND ENTERED ON OCTOBER 6TH, 1965

A motion having been made herein by counsel for the trustees' appellees to dismiss the appeal for lack of standing and for dilatoriness,

Upon consideration, thereof, it is

ORDERED, that said motion be and it hereby is granted and that the appeal from the U. S. District Court for the Southern District of New York be and it hereby is dismissed. (R.193a)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Questions Presented

1. In Proceedings for the Reorganization of a Corporation under Chapter X of the Bankruptcy Act, may a person who is neither a representative of the debtor, a creditor, a stockholder, or an intervenor appeal from decisions of the reorganization court?

2. In Proceedings for the Reorganization of a Corporation under Chapter X of the Bankruptcy Act, may stockholders and bondholders of the debtor who did not object

to the approval or confirmation of the Plan of Reorganization and failed to vote with respect to said Plan appeal from the order confirming the Plan of Reorganization?

Opinions Below

Petitioners herein seek the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit ("Court of Appeals") in connection with the opinion and order of the Court of Appeals made and entered on October 6, 1965 (See Petitioners' Appendix).

The aforesaid opinion and order of the Court of Appeals was rendered in connection with the following opinions and orders of the United States District Court for the Southern District of New York ("District Court"):

(a) Opinion of the District Court dated February 8, 1965, (1a-17a)[1] and order dated February 15, 1965 (R. 330-350) approving the Plan or Reorganization for Preston House Sire Plan, Inc. ("Preston House"). Petitioner Claire B. Cohen filed a notice of appeal therefrom (R. 351-352).[2]

(b) Memorandum Opinion and Order of the District Court dated March 8, 1965 (18a) which denied the application of Claire B. Cohen to supplement and amend the findings and opinion of the District Court described above (*a*). Petitioner Claire B. Cohen appealed from the aforesaid order (Filed Apr. 16, 1965).

(c) Memorandum Opinion of the District Court dated May 18, 1965 (19a), and order dated May 28, 1965, confirming the approved Plan of Reorganization for Preston House. Petitioners Cohen, Grossman and Chabinsky appealed from the aforesaid order (R. 557-571).

1. References are to pages of respondents' appendix unless otherwise indicated.

2. References in parenthesis preceded by the letter "R" refer to the Record docketed by Petitioners.

Statement

Preston House is one of the twenty (20) subsidiary and affiliated corporations in companion reorganization proceedings under Chapter X of the Bankruptcy Act pending in the District Court. The reorganization proceedings involve the over-all Sire Plan organization which was generally engaged in the public syndication of real properties (R. 166-175).

The facts and circumstances relative to Preston House and the reorganization proceedings affecting that debtor are set forth in detail in the opinion of the District Court (1a-17a).

The petition for reorganization of Preston House under Chapter X of the Bankruptcy Act was filed in the District Court on February 16, 1963 (R. 166-175). Thereafter, Lazarus Joseph and David I. Shivitz were appointed as Reorganization Trustees (R. 166-175). Contrary to the assertion of Petitioners herein (See p. 4 of the instant petition) notice of the appointment of said Trustees was given to all creditors, stockholders, indenture trustees and the Securities & Exchange Commission in accordance with §161 of the *Bankruptcy Act,* 11 U.S.C. §561. Moreover, in accordance with §162 of the *Bankruptcy Act,* 11 U.S.C. §562, a hearing was held before the District Court in April of 1963 to consider any objections to the retention of the Reorganization Trustees. Not one objection was filed to the continued retention of the Reorganization Trustees.

During the course of the reorganization proceedings affecting Preston House, the Reorganization Trustees, proposed a Plan of Reorganization for that debtor corporation which in substance provided for the transfer of the real property owned by the debtor and the creation of a Creditors' Cash Fund (R. 223-236). The Plan of Reorgan-

ization incorporated the proposal of one Dr. Israel Weinraub to purchase the aforesaid real property (R. 223-236). Hearings were held before the court, upon due notice, to consider the approval of the Trustee's Plan of Reorganization (R. 1-130).

In connection therewith, the Petitioner, Claire B. Cohen, who had no interest in any of the Sire Plan Corporations had her attorney, Leonard Cohen, communicate with the Trustees for the purpose of inducing the said Trustees to consider the amendment or modification of their proposed Plan of Reorganization so as to substitute for the Weinraub purchase offer, a proposal made on her behalf. The Trustees were unable to reach agreement with Leonard Cohen and after due deliberation, the court approved the Trustee's Plan of Reorganization (1a-17a).

Thereafter Mrs. Cohen attempted, by application, to have the District Court supplement and amend the opinion of February 8, 1965 (R. 296-302). However, the said application was denied by the District Court (18a).

During this period, the Reorganization Trustees, in accordance with the provisions of the order of February 15, 1965 undertook and caused the distribution of the approved Plan of Reorganization to the persons entitled to receive same in accordance with §175 of the *Bankruptcy Act,* 11 U.S.C. §575, together with notice of a hearing to be had thereon, a letter of transmittal, a summary of the Plan of Reorganization and a ballot form for voting purposes, among other items (R. 534-556).

On May 17, 1965 a hearing was held before the District Court to consider the confirmation of the Trustees' Plan of Reorganization. No objections were filed in opposition to the confirmation of said Plan which incorporated the Weinraub purchase offer (R. 640-667).

Two hundred sixty-six (266) public investors hold debentures of Preston House amounting to $140,000.00 in face amount. One hundred fifty-one (151) of the said public investors filed claims, based upon the aforesaid debentures, which totaled $108,959.75 and such persons were entitled to vote on the Trustees' Plan of Reorganization. The Trustees received acceptances of the said Plan from one-hundred ten (110) debenture holders having claims totaling $85,078.65, and forty-one (41) rejections which totaled $23,881.10. Accordingly, the Trustees' Plan of Reorganization was overwhelmingly accepted by the persons most affected thereby (R. 640).

On May 28, 1965 the District Court entered the order confirming the Trustees' Plan of Reorganization for Preston House (R. 557-571).

Petitioner, Claire B. Cohen, filed a notice of appeal from the order of the District Court dated February 15, 1965, approving the Trustees' Plan of Reorganization for Preston House. In addition, a notice of appeal was filed by said petitioner from the Opinion and Order of the District Court dated March 8, 1965. Subsequent to the confirmation of the Plan of Reorganization for Preston House, Petitioners Claire B. Cohen, Grossman and Chabinsky, *jointly,* filed a notice of appeal from the Order of Confirmation dated May 28, 1965. As to the aforesaid three (3) notices of appeal, Leonard Cohen, the husband of Petitioner Claire B. Cohen, appears as the attorney for the appellants.

On August 11, 1965 the Trustees moved in the Court of Appeals to dismiss all of the aforesaid appeals on the ground that none of the appellants had standing to appeal. The Motion to Dismiss the said appeals was granted and is the subject of the instant petition.

The Petitioners' attorney has seen fit, in an effort to support the instant petition, to make outrageous and scandalous comments to impugn the honor and integrity of the District Court, the Trustees, their counsel and other attorneys who appeared in the proceedings. No useful purpose is served by dignifying the invidous remarks of Mr. Cohen by responding thereto. The baseless insinuations of Petitioners' attorney are neither relevant nor pertinent to the questions presented by the instant petition.

ARGUMENT

I. The Court of Appeals correctly dismissed the appeals of Claire B. Cohen.

It is a cardinal principle of our jurisprudential system that the right of appeal is limited to those persons who had the right to be heard in the judicial proceedings before the lower court. *Young* v. *Higbee*, 324 U. S. 204 (1945).

In proceedings for the Reorganization of a Corporation under Chapter X of the *Bankruptcy Act* the right to be heard is specifically granted to certain named parties pursuant to §206 of the *Bankruptcy Act*, 11 U.S.C. §606:

> "The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter * * *."

In accordance with §207 of the *Bankruptcy Act*, 11 U.S.C. §607, the right to be heard is extended to parties in interest who are allowed by the judge, for cause shown, to intervene generally or with respect to any specified matter.

The Petitioner, Claire B. Cohen, is concededly neither the debtor, an indenture trustee, a creditor or stockholder

of Preston House, the corporate debtor. Moreover, the said Claire B. Cohen never applied to the District Court for leave to intervene, generally, or, with respect to any specified matter involving the reorganization proceedings affecting Preston House.

A fortiori Claire B. Cohen had no right to be heard in the District Court. It is, therefore, self-evident that Claire B. Cohen has no standing to appeal from any of the decisions of the reorganization court with respect to Preston House.

In *Peckham* v. *Casalduc*, 261 F. 2d 120 (1st Cir. 1958) cert. den. 359 U. S. 958 (1959), the precise factual situation as that in the petition at bar, involving Mrs. Cohen, was presented to the court. In that case, the court dismissed an appeal filed by a claimed equitable lienor who sought to enforce his claim against shares of stock in the reorganized corporation. The court stated:

> "Peckham is *neither a creditor of Ronrico nor is he one of its stockholders.* Thus he does not have 'the right to be heard on all matters arising in a proceeding' for reorganization under Chapter X of the Bankruptcy Act conferred by §206 of that Act." 261 F. 2d at p. 121. (Emphasis supplied.)

Mrs. Cohen being neither a creditor nor stockholder of Preston House had no right to be heard under Section 206 of the *Bankruptcy Act, supra,* and, therefore, no right of appeal. Thus, it is only pursuant to Section 207 of the *Bankruptcy Act, supra,* that a right of appeal could arise in favor of Mrs. Cohen. In order to secure said right it is mandatory, under that section, that a motion for intervention be made and granted. Such is not the case herein. The fact that Mrs. Cohen's attorney did negotiate with the Reorganization Trustees, appeared at hearings held before the District Court and received notices in connection therewith does not accord to Mrs. Cohen the rights of an intervenor.

The *Peckham* case, *supra,* meets this issue squarely and in that case, where the appellant had received notices of hearings held before the reorganization court and had participated therein, the court stated:

> "* * * The fact remains that at no time in these proceedings has Peckham ever made any attempt to intervene by serving an appropriate motion in accordance with the procedure set out in Rule 24(c) of the Federal Rules of Civil Procedure, 28 U.S.C. A. *The fact that the court below allowed him to be heard and to participate in the proceedings by filing objections, being heard in argument, etc., does not serve to make him a party.* * * * Nor do the privileges accorded to him in the court below give him the right to appeal as a party from any decree of that court." 261 F. 2d at p. 121. (Emphasis supplied.)

The appeals purportedly taken by Petitioner Claire B. Cohen, who did not make any attempt to intervene, fall squarely within the four corners of the ratio decidendi enunciated by the court in the *Peckham* case, *supra.*

The cases cited by petitioners at pp. 13 and 14 of the petition herein are inapposite. There was no "judicial sale" involved in the Preston House reorganization proceedings and, hence, there could be no appeal therefrom. The appeals filed are from orders of the District Court approving and confirming a Plan of Reorganization.

Accordingly, it is abundantly clear that Petitioner, Claire B. Cohen, is a stranger to the reorganization proceedings involving Preston House and had no right to be heard in respect thereof. Consequently, Petitioner, Claire B. Cohen, had no standing to appeal from orders of the District Court and the dismissal of such appeals by the Court of Appeals was correct.

II. Petitioners Grossman and Chabinsky, having failed to object to the approval and confirmation of the Trustees' Plan of Reorganization for Preston House lack the requisite standing to appeal from the order of confirmation.

Upon the acceptance, in writing, of a Plan of Reorganization, §179 of the *Bankruptcy Act,* 11 U.S.C. §579 provides, *inter alia,* that a hearing shall be scheduled, "for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation". The aforesaid section provides that notice of said hearing shall be given to, "the debtor, creditors, stockholders, indenture trustees, Secretary of the Treasury, the Securities & Exchange Commission, and such other persons as the judge may designate". In accordance with the provisions of the order of the District Court, dated February 15, 1965, notice was given as required therein and by the applicable provisions of the *Bankruptcy Act.*

Prior thereto, notice had been given to all of the aforesaid in connection with the hearings held before the District Court to consider the approval of a Plan of Reorganization for Preston House. Extended hearings were held before the District Court for the consideration of such approval. No objections were interposed or filed to the approval of the Plan of Reorganization for Preston House proposed by the Reorganization Trustees.

Petitioners Grossman and Chabinsky received notice of the hearings on approval and did not object thereto nor appeal from the order approving the Plan of Reorganization. Furthermore, Petitioners Grossman never filed a Proof of Claim against Preston House. Petitioners Grossman and Chabinsky received notice of the hearing held

before the District Court to consider the confirmation of the approved Plan of Reorganization. The said petitioners did not affirmatively accept or reject the said Plan of Reorganization, but remained mute. Petitioners Chabinsky who were entitled to vote for acceptance or rejection of the said plan, did neither.

It is now the contention of counsel for Petitioners Grossman that said Petitioners did object to the confirmation of the said plan. This contention is wholly unsupported by the record herein.

At the hearing held before the District Court to consider the confirmation of the Plan of Reorganization, testimony was adduced to the effect that the operating income generated from the management of Preston House was insufficient to meet the expenses of operation and debt service. At the conclusion of oral testimony the following events transpired:

> "The Court: . . . All right, does anyone else want to be heard.
>
> Mr. Grossman: Yes.
>
> The Court: What is your name?
>
> Mr. Grossman: My name is Abraham Murray Grossman. I am a blind veteran.
>
> In the management—it looks like Preston House is under poor management. Is there any way you could appoint some other people to check over on this management, how it was managed, because it is poor management, and I would suggest that the court order that they have an unbiased auditor look over these books and see what is wrong with the management.
>
> The Court: I will take your suggestion under advisement, but I will hear from the Trustees' counsel."

(R. 666).

It is self-evident that Mr. Grossman's comments were directed to the operation and management of the Preston House property rather than to any objection to the Trustees' Plan of Reorganization. Moreover, Mr. Grossman's comments were ill-founded and the Trustees' counsel responded thereto in the following manner:

> "Mr. Seligson: Your Honor, I don't understand the statement 'poor management of the property.' The property is fully rented. The property was not able to take care of payments on the second and third mortgages when the reorganization petition was filed. They were in default at that time. I don't understand the statement of poor management when on the face of it there has been excellent management. There have been no vacancies at all. The trouble is that there was too much paid for the property to begin with." (R. 666-667)

Subsequently, the District Court by its memorandum opinion dated May 18, 1966 (19a) found that the property had been well managed under the Trustees' administration. In addition, the record establishes that the Trustees did retain independent certified public accountants and real estate management agents to manage the Preston House property (R. 574-774).

The instant matter is strikingly similar to that in, In *Re Kenmore-Granville Hotel Co.,* 92 F. 2d 778 (7th Cir. 1937) cert. den. sub nom *Meyer* v. *Kenmore-Granville Hotel Co.,* 302 U. S. 767 (1938). In that case the appellants were bondholders of the debtor and appealed from two orders of the District Court, one of which confirmed a Plan of Reorganization. The appellants therein had originally filed objections to the approval of the plan which objections had been overruled by the lower court. An appeal from the lower court's decision was dismissed

by the Court of Appeals for the Seventh Circuit. *Meyer* v. *Kenmore-Granville Hotel Co.*, 77 F. 2d 1004, app. dis'd, 78 F. 2d 1018 aff'd 297 U. S. 160 (1936). Thereafter, the appellants did not appear at the hearing on confirmation of the Plan of Reorganization and they did not file objections to the confirmation of said plan. However, they did file an appeal from the order of confirmation, as aforesaid.

The Court of Appeals for the Seventh Circuit dismissed the appeal filed from the order of confirmation and held that the appellants were attempting to secure the review of matters already presented and determined by the lower court. The court fully agreed with the statement made in the lower court that such an appeal, ". . . would establish a new practice, not authorized by the rules of the Court or warranted in this proceeding, to seek review after full opportunity for hearing and after failure of counsel to appear in court upon a day set for hearing, of which counsel had both notice and knowledge." 92 F. 2d at p. 780.

The principal enunciated in the *Meyer* case, *supra,* is directly in point in the case at bar. The Petitioners Grossman and Chabinsky had a full opportunity for hearing before the District Court and failed to object in anywise to the confirmation of the Plan of Reorganization for Preston House. As stated above, the Plan of Reorganization for Preston House was overwhelmingly accepted by the creditors entitled to vote thereon.

It must be respectfully noted that the Securities and Exchange Commission, at the hearing on confirmation held before the District Court, indicated its approval of the Trustees' Plan of Reorganization and, certainly, did not object to the confirmation thereof. The said Securities and Exchange Commission did not join in any of the

appeals filed by Petitioner Cohen or the appeal purportedly filed on behalf of Petitioners Grossman and Chabinsky.

An analogous situation to that presented by the instant petition arises in the approval or disapproval of compromises of controversies in the administration of bankrupt estates, pursuant to §27 of the *Bankruptcy Act*, 11 U.S.C. §50. In the usual case notice is given to all creditors and parties in interest of a trustee's application to compromise a controversy and of the hearing to be had thereon. A compromise of a controversy by a trustee which is approved by the bankruptcy court is binding on all parties. 2 *Collier, Bankruptcy* 1091, Par. 27.05 (14th ed. 1964).

In *In Re Peppers Fruit Co.*, 24 F. Supp. 119 (D.C. Cal. 1938) a proposed compromise of a controversy was approved by the referee in bankruptcy after a hearing upon due notice. At the hearing an objection to the compromise was interposed by one "Lehman", a creditor of the bankrupt. The objection was overruled. Subsequently, Lehman and two other creditors filed a Petition to Review the referee's order of approval. The two creditors who had joined with Lehman had not appeared or objected to the compromise at the hearing before the referee in bankruptcy. As to those two creditors, the District Court dismissed the Petition to Review on the ground that such creditors were not proper parties thereto. In this connection, the court stated:

> ". . . In the interest of economy and efficiency of administration of bankrupt estates, reviews from referees' orders, at least those orders which are made after notice, should be limited to applications by parties who have appeared at the hearing before the referee and participated therein. Any other

holding would leave the door open to a flood of reviews which would result not only in delay and expense, but would place an almost intolerable burden upon the district judges." 24 F. Supp. at 2121-122.

See also: *In Re Mifflingburg Body Co.*, 54 F. Supp. 560 (D.C. Pa. 1944).

The rationale expressed in the *Pepper* case, *supra*, is clearly applicable to the instant petition. Petitioners Grossman and Chabinsky at no time during the Reorganization Proceedings objected to any of the actions undertaken by the Reorganization Trustees. Despite the request of said Trustees for suggestions and proposals concerning the formulation of a Plan of Reorganization the said Petitioners remained silent. It must be borne in mind that the proceedings before the District Court relative to the formulation of a Plan of Reorganization for Preston House the approval thereof and the confirmation of said Plan extended over a period in excess of six (6) months. During this entire period, Petitioners Grossman and Chabinsky were content to allow the trustee to proceed without objection on their part. To allow Petitioners Grossman and Chabinsky to come in at this late date would place an "intolerable burden" upon the Trustees, the District Court and the Court of Appeals.

The reorganization court cannot be expected to ferret out objections which may exist in the minds of "disinterested creditors" which are never expressed. Indeed, it must be seriously pondered as to how Petitioner Cohen and Petitioners Grossman and Chabinsky came to form a "coalition" herein and the purpose thereof.

Manifestly, the Court of Appeals properly dismissed the appeals from the District Court.

III. The questions presented by the petition are moot.

Subsequent to the dismissal of the appeals described above, none of the petitioners took any affirmative action to enjoin the consummation of the Plan of Reorganization affecting Preston House. In point of fact, it was not until January 3, 1966 that the Petitioners in any wise put the Reorganization Trustees on notice as to the instant petition, two months after the consummation of that portion of the plan of reorganization requiring the transfer and conveyance of the subject property.

As indicated in the Trustees' report to the reorganization court, pursuant to §167(1) of the *Bankruptcy Act,* 11 U.S.C. §567(1) (R. 166-175), and the opinions of the District Court dated February 8, 1966 (1a-17a) and May 18, 1965 (19a) the net income generated from real property owned by Preston House was insufficient to meet all operating expenses and debt service. The District Court stated, in the opinion of May 18, 1965:

> "The Trustees cannot for lack of funds, continue to operate the property for any appreciable period".

Accordingly, the Trustees proceeded to consummate the confirmed Plan of Reorganization. On November 4, 1965 the Trustees conveyed and transferred to Dr. Israel Weinraub the real property owned by Preston House. In connection therewith the Trustees undertook the satisfaction of the outstanding mechanic's lien of record and other expenses and costs relative to the consummation of the Plan of Reorganization.

In view of the consummation of the Plan of Reorganization, the transfer and conveyance of the real property, and the complete change in position of all parties necessitated by the inability to continue to own, operate and

manage the subject property no conceivable purpose would be served by the issuance of a writ of certiorari at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 1, 1966

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APPENDIX

Opinion of District Court Approving Plan of Reorganization, Dated February 8, 1965

Sugarman, D. J.

At the date of the filing of the reorganization petition herein, Preston House Sire Plan, Inc. (hereinafter called "Preston House"), one of the above-named debtors, was the the owner of certain real estate known as 444 Middle Neck Road, Great Neck, Long Island, New York. The improvements on this land consisted of a 4-story, brick, fireproof building, containing 51 apartments, aggregating 293 rooms, with 35 garage spaces in the rear of the building. The real estate then was subject to the following liens of record: a first mortgage held by the East New York Savings Bank, upon which there was then due the sum of $364,264.59; a second mortgage held by Pitkin Auto Exchange, Inc., on which there was due the sum of approximately $112,474, plus interest thereon from December, 1962 at the rate of 6% per annum; a third mortgage held by Swim City, Inc., a corporation controlled by one Harry Brock, or its assignees, on which there was a balance of principal due in the approximate amount of $73,500, and which mortgage provided for the payment of interest at the rate of 6% per annum commencing on April 1, 1961, to December 31, 1962, with interest accelerating to 19% per annum after that date if the mortgage was not satisfied; and a mechanic's lien in the amount of approximately $2,500.

Lazarus Joseph, Esq. and David I. Shivitz, Esq., the reorganization Trustees, after their appointment and qualification as Trustees, took possession of the said real

estate on February 16, 1963 and, pursuant to order of the Court, retained The J. M. Brown and J. Clarence Davies Corporation as their managing agent, and the Trustees since that time have operated and managed the real estate through such corporate agent. No interest or amortization has been paid to either the second or third mortgagee since the Trustees' qualification. All payments were made on the first mortgage held by the East New York Savings Bank, originally in the sum of $490,000, in accordance with its terms, to July 1, 1964, the date of maturity of said mortgage. The principal amount due to the first mortgagee on July 1, 1964 was $338,225.14.

The second mortgage in the sum of $145,000 was executed and delivered to the Pitkin Auto Exchange, Inc. on or about January 12, 1960. The said mortgagee allegedly paid a cash consideration of $127,600 and the balance of $17,400 constituted a bonus or discount. The mortgage was payable in monthly installments of $1,450, commencing February 12, 1960 until January 12, 1962, when the entire unpaid balance became due and payable with interest. On or about February 2, 1962, the debtor executed and delivered to Pitkin Auto Exchange, Inc. an additional mortgage in the sum of $18,224. This mortgage was then consolidated with the original second mortgage, on which there was then an outstanding balance of $110,200, to form a consolidated lien in the sum of approximately $128,424. The maturity date of the alleged consolidated second mortgage was January 12, 1964. The additional mortgage apparently represented a bonus for the extension of the time of payment of the second mortgage.

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Thereafter, and on or about March 1, 1961, the debtor executed and delivered to Sire Plan, Inc. a third mortgage upon its said real estate in the sum of $67,500. Simultaneously, Sire Plan, Inc. assigned this third mortgage to Swim City, Inc., which allegedly paid $60,000 in consideration therefor. The difference of $7,500 apparently represented a bonus or discount. This third mortgage provided for the payment of interest at the rate of 6% per annum, commencing on April 1, 1961 and monthly thereafter. If the principal remained unpaid after March 1, 1962, the interest rate was to be increased to 19% per annum. On February 2, 1962 the debtor executed an additional mortgage to Swim City, Inc. in the sum of $6,250. This mortgage was subject and subordinated to the second mortgage held by Pitkin Auto Exchange, Inc. and it was consolidated with the prior third mortgage to form a single consolidated lien in the sum of $73,750, with interest at the rate of 6% per annum. The entire principal was to be paid on December 31, 1962; failing which, the interest rate was to be increased to 19% per annum. No monies were paid to the debtor by Swim City, Inc. for the additional mortgage in the sum of $6,250, which apparently was a bonus. The debtor's records do not reflect the receipt of any monies from the execution and delivery of the third mortgage in the sum of $67,500.

The debtor undertook a public offering of its preferred stock and debentures in order to raise $280,000 to finance the acquisition of the said real estate. This money was raised by the sale of 2,800 10-year, 6% debentures in the face amount of $50, and 2,800 shares of 6% cumulative non-callable participating preferred stock having a par

value of $50 per share. The debentures and preferred stock are now held by approximately 266 public investors. The debentures sold to the public were issued pursuant to a trust indenture which, among other things, stated that the corporation would not incur any obligation for borrowed money, except for corporate purposes, without the prior written consent of the holders of a majority in principal amount of the outstanding debentures. However, this consent was not required for the creation of any mortgages designed to reduce the balance of the unpaid principal of the debentures nor in the case of the refinancing of the mortgage for the purpose of obtaining a new mortgage on more favorable terms. Despite these provisions of the trust indenture the second and third mortgages were executed and delivered. The parties to the trust indenture were Preston House Sire Plan, Inc., The Sire Plan, Inc., as pledgor, and Carlisle Davidson, as trustee. This trust indenture was not recorded nor filed in any public office.

Prior to the filing of the reorganization petition, and on or about the 25th day of January, 1963, Pitkin Auto Exchange, Inc. commenced an action in the Supreme Court of the State of New York, County of Nassau, to foreclose its consolidated second mortgage. The mortgagee also applied to the Supreme Court, County of New York, in a receivership proceeding in which John T. Cahill had been appointed receiver, for leave to continue the prosecution of the foreclosure proceeding in Nassau County. The application was granted and the receivership of John T. Cahill was extended to include the foreclosure action in Nassau County. Upon the institution of the within reor-

ganization proceedings, Pitkin Auto Exchange, Inc. was specifically enjoined and stayed from further prosecution of its foreclosure proceeding.

In February, 1963, Pitkin Auto Exchange, Inc. applied to this Court for permission to continue the prosecution of the pending mortgage foreclosure proceeding. This application was denied and an appeal was taken to the United States Court of Appeals for the Second Circuit. The order of the District Court was affirmed without prejudice, however, to the right of the said second mortgagee to renew its application upon appropriate papers. The mortgagee did renew its application by notice of motion, dated May 28, 1964, and as a result of an agreement made with the Trustees that the property be offered for sale or that a plan of reorganization providing for the sale thereof be filed by the Trustees, the renewal application for permission to continue the foreclosure proceeding was adjourned *sine die*.

According to the Trustees' application for authority to offer the real estate for sale, dated June 22, 1964, the operating figures were as follows: the gross income from the real estate from February 16, 1963 to February 29, 1964 was $128,671.08. In that period of time the expenses, exclusive of debt service on the first mortgage, totalled $83,566.96. Thus, the net throw-off from operations was $45,104.12. Debt service on the first mortgage through January 1, 1964, consisting of interest and amortization, totalled $36,760. Consequently, there was available for payment upon the junior liens only the sum of $8,344.12.

In addition, the Trustees advanced from other funds the sum of $8,156, and these monies must be repaid (see

Trustees' Exhibit 1, June 8, 1964). The corporate real estate agent of the Trustees has projected for the year ending February 28, 1965 a gross income of $114,896 against total expenses, before debt service, of $83,043.50. Therefore, there will be a net of $31,852.50 before any payments in reduction of the first mortgage. (See Trustees' Exhibit 2, June 8, 1964.) Hence, the net income will be insufficient to meet the interest and amortization payments on the first mortgage lien held by the East New York Savings Bank which mortgage matured on July 1, 1964.

The Trustees, by application dated June 22, 1964, prayed for an order authorizing them to offer the real estate for sale at a public hearing, free and clear of all encumbrances, such liens and encumbrances to attach to the proceeds of sale. On June 23, 1964 the Court made an order requiring the mortgagees and other parties in interest to show cause on June 30, 1964 why the Trustees should not be granted the relief sought. After the hearing, and on the 16th day of July, 1964, an order was made granting the said application of the Trustees, authorizing the sale of the real estate on October 1, 1964, free and clear of all encumbrances, subject to a minimum sales price of $375,000, without any representations or warranties of any kind, such liens and encumbrances to attach to the proceeds of sale. That order also fixed October 8, 1964 as the date of the hearing for the consideration of the confirmation of any acceptable offer or offers to purchase the real estate.

Subsequently, the Trustees entered into negotiations with Dr. Israel Weinraub, through his counsel, Irving

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Stolz, Esq., for the purchase by him of the real estate. Dr. Weinraub offered to pay the Trustees the sum of $86,000 for the Trustees' right, title and interest in and to the real estate, subject to the first and second mortgages. This offer was conditioned, however, upon the execution and delivery to Dr. Weinraub immediately by the Trustees of an estoppel certificate in respect of the second mortgage to the extent of the amount which Dr. Weinraub had offered to pay for such second mortgage, to wit, $101,500. Under the terms of the offer, the Trustees were obligated to pay interest at the rate of 6% per annum on second mortgage indebtedness of $101,500 until title was closed, whether or not Dr. Weinraub ultimately acquired title. At the time of these negotiations, there were two violations against the real estate, one, a parking violation because of alleged insufficient space to take care of the professional tenants in the building, and the other, a violation for failure to maintain fire escapes and outside window trim in satisfactory fashion. Dr. Weinraub agreed to accept title to the building subject to these two violations. The Trustees were advised by Dr. Weinraub that concurrently with the acceptance of his offer by the Trustees, subject to ultimate Court approval, he would enter into an agreement with the holder of the second mortgage for the conditional purchase thereof.

Thereafter, and on or about the 18th day of September, 1964, the Trustees applied to the Court for authority to execute an estoppel certificate in favor of Dr. Weinraub, recognizing the consolidated second mortgage as a valid and subsisting lien to the extent of $101,500 and authorizing and empowering the Trustees to waive any and all

rights to contest the validity of such mortgage to the extent of $101,500, provided Dr. Weinraub purchased the consolidated second mortgage and irrevocably offered to purchase the debtor's real estate upon the terms mentioned. On the 25th day of September, 1964, and after a hearing held on the 21st day of September, 1964, an order was made by this Court granting the Trustees' application and authorizing the Trustees to enter into a contract with Dr. Weinraub for the purchase by him of the said real estate, subject to the approval of the Court and the requirements of Chapter X of the Bankruptcy Act. This order further provided that the contract might provide for its incorporation in a plan of reorganization, and it also vacated the provisions of the order of July 16, 1964 relating to the proposed public sale of the real estate.

On the 13th day of October, 1964, the Trustees filed a plan for the debtor's reorganization. This plan was based upon the offer of Dr. Weinraub, which was incorporated therein. In accordance with the order of the Court, dated September 25, 1964, a hearing, pursuant to Section 169 of the Bankruptcy Act, was fixed for November 10, 1964. This hearing was held on November 10, 1964 and was then adjourned to November 18, 1964 for the purpose of affording an opportunity to one Charles I. Pearson to submit a proposed plan of reorganization for the debtor. Thereafter, on November 18, 1964, an extended hearing was held for the purpose of giving further consideration to the Trustees' plan of reorganization, incorporating the offer of Dr. Weinraub and of considering the modification of the Trustees' plan so as to incorporate an offer from

Charles I. Pearson in place and stead of the offer from Dr. Weinraub.

The offer of Charles I. Pearson provided for the purchase of the real estate for the sum of $75,000, in cash. The testimony adduced at the hearing on November 18, 1964, however, established beyond peradventure of a doubt that the conditions attached to the Pearson offer could not be satisfied by the Trustees. The Trustees, under this offer, would be required to pay interest on all mortgages and this would include interest at the rate of 19% per annum from December 31, 1962 upon a principal balance of $73,500 on the consolidated third mortgage. The offer of $75,000 in cash, upon analysis, did not in fact offer the Trustees a net of that amount. The payment of interest on the third mortgage alone to December 31, 1964 would amount to $27,930. Moreover, the Pearson offer required the Trustees to make representations as to the outstanding balances on the consolidated second and third mortgages. It further provided that the Trustees could not waive their rights to contest the validity of these mortgages and that the Trustees should assign these rights to Pearson. The Trustees had issued an estoppel certificate to Dr. Weinraub, pursuant to the order of the Court, and, consequently, could not reserve the right to contest the second mortgage to the extent of $101,500. Additionally, there is some doubt as to whether the Trustees have the right to assign rights of action of the kind here involved. *Webster* v. *Barnes Banking Co.*, 113 F.2d 1003 (10th Cir. 1940); *cf. In re Downing*, 201 Fed. 93 (2d Cir. 1912). The Court advised Mr. Pearson that his proposal was unacceptable for the reasons stated but granted leave to Mr. Pearson to file an amended proposal if he desired to do so.

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By letter dated November 19, 1964, Mr. Pearson advised the Court that he was unwilling to amend any of the provisions of the proposed contract submitted by him to the Trustees herein. However, on or about the 27th day of November, 1964, the Court was advised by Albert Mintzer, originator of the Sire Plan, that Charles Pearson would be willing to amend his proposal, subject to stated conditions. An analysis of these conditions by the Court compelled the conclusion that the Pearson proposal, even as amended, would not be as advantageous to the estate as the Weinraub proposal, and Mr. Mintzer was so advised.

In the meantime and on the 25th day of November, 1964, an offer to purchase the real estate for the sum of $55,000 in cash "upon similar terms as offered to Dr. Weinraub" was made by Leonard Cohen, Esq., on behalf of a client. Because of the receipt of this offer and in the hope that a better offer might develop at a hearing which all potential purchasers would be invited to attend, the Court reopened the hearing under Section 169 of the Bankruptcy Act and fixed December 16, 1964 as the date of the reopened hearing. Notice of this reopened hearing was duly given by the Trustees to all parties in interest.

On the 16th day of December, 1964, the reopened hearing was held for the consideration of all offers to purchase the real estate of the debtor which could be incorporated in a plan of reorganization. At this hearing the Weinraub and Cohen offers were modified and there were four offers for consideration by the Court and the creditors. These offers were as follows:

1. The Weinraub offer to pay $50,000 in cash subject to the three mortgages, evidenced by the

agreement with the Trustees, dated September 28, 1964, as modified at the hearing so as to eliminate requirements concerning the use of the building and altered in other respects, incorporated in the Trustees' plan, specifically providing that the Trustees shall waive any rights to contest the validity of the consolidated second mortgage and shall recognize the same as a valid and subsisting lien against the property to the extent of the cost to Dr. Weinraub in acquiring said mortgage, to wit, $101,500, with interest at the rate of 6% per annum from the date of such acquisition. The contract further provided that, simultaneously with the closing of title, the Trustees shall waive any and all rights to contest the validity of the existing consolidated third mortgage and shall recognize such consolidated third mortgage as a valid and existing lien against the real estate and that in the event Dr. Weinraub did not acquire title to the property, such waiver would be of no force and effect;

2. The Pearson offer, which has been described above, and which, even as modified, was less advantageous to the estate of the debtor than the Weinraub offer;

3. The Cohen offer, which, in essence, contemplated the purchase of the real estate, subject to the existing first and second mortgage liens, for a cash consideration of $101,000. Under this offer, the Trustees would be required to accept the responsibility of eliminating the consolidated third mortgage; and

4. The offer of N. Edward Mitchell to purchase the property on substantially the same terms as those contained in the Cohen offer, except that the purchase price would be $100,500.

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At the conclusion of the hearing held on December 16, 1964, Mr. Cohen was advised by the Court that his client's offer, as set forth in Trustees' Exhibit 1 of December 16, 1964, and the testimony adduced in connection therewith, should be reduced to writing and properly submitted within forty-eight hours. In view of the fact that the Weinraub offer generated the other offers to purchase the debtor's real estate, the Court announced at the said hearing on December 16, 1964 that Dr. Weinraub would be given an opportunity to match any offer which might be made by Mr. Cohen's client. On or about the 21st day of December, 1964, the amended Cohen offer was received by the Trustees, having been mailed on December 18, 1964.

By letter dated December 28, 1964, as amended by letter of December 30, 1964, the Trustees analyzed the four offers and advised the Court that the Cohen offer, as amended, was the best offer submitted. It was pointed out, however, that Dr. Weinraub had been given the right to match the Cohen offer and the Trustees requested that Dr. Weinraub be directed to advise them within forty-eight hours as to whether he intended to do so.

Thereafter and by letter dated January 7, 1965, the Trustees, by their counsel, advised the Court that the Weinraub offer had been amended so as to increase the purchase price from $50,000 to $59,000. The Trustees further informed the Court that in their considered judgment the Weinraub offer, as further amended, completely matched the amended Cohen offer. It was pointed out by the Trustees that in reaching this conclusion they took into consideration the fact that they would be left with the problem of negotiating a reduction in the amount of the

consolidated third mortgage or of contesting the validity thereof. Any contest with respect to the validity of such mortgage would be time-consuming and expensive, even if the Trustees ultimately prevailed; and the Trustees recognized the fact that the outcome of such litigation was at best uncertain. The differential of $5,000 between the cash to be received under the Weinraub offer would be more than offset by the expense to the estate involved in negotiating a settlement of the third mortgage or in prosecuting a suit challenging its validity in whole or in part with the attendant expense and delay of appeals, if necessary, and the possibility of liability for the full amount of the mortgage and interest.

On or about the 3rd day of February, 1965, the Court was advised by Trustees that following their recommendation to the Court that the Weinraub offer, as amended, be accepted, further conferences were held with Leonard Cohen, Esq., who had submitted the amended Cohen offer and that such conferences had not been fruitful. Mr. Cohen refused to improve that Cohen offer and endeavored to convince counsel for the Trustees that the Cohen offer had not been matched by the amended Weinraub offer. The Trustees again recommended that their plan of reorganization, as amended so as to incorporate the amended Weinraub offer, be approved.

The Weinraub offer provides for the payment to the Trustees of the sum of $59,000 in cash; the Cohen offer for the payment to the Trustees of $101,000 in cash. Under each offer the purchaser would acquire the real estate subject to the existing first mortgage (now fully matured) in the sum of $338,225.14. The Trustees would

be responsible for the payment of interest thereon to the date of closing. The real estate would also be acquired under each offer subject to the existing consolidation second mortgage in the principal sum of $112,474, with interest thereon at the rate of 6% per annum from December 12, 1962 to September 28, 1964. The Trustees would be responsible for interest from September 28, 1964 to the date of closing, computed upon a principal outstanding balance of $101.500, the consideration paid by Dr. Weinraub in acquiring the consolidated second mortgage. Dr. Weinraub would take the property subject to the consolidated third mortgage, but under the Cohen offer, the property would be conveyed by the Trustees free and clear of the third mortgage. In the event that the Trustees were unable to make a satisfactory accommodation with the holders of the third mortgage, they would be required to contest the validity thereof. If they were unsuccessful in such contest, the Trustees would be responsible for the payment of the entire principal and interest thereon. Under those circumstances, it is not unlikely that the entire cash received under the Cohen offer would be absorbed.

The income from the real estate is insufficient to meet operating expenses. None of the offerors has indicated a willingness to make a commitment to have his offer used as an upset price at a public sale of the real estate. Even if the Trustees were successful in their efforts to invalidate the third mortgage, it would be many months, if not years, before the property could be finally disposed of. There is danger that such delay would operate adversely to the interests of this estate.

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The Court is satisfied that the Weinraub proposal, as amended, substantially matches the amended Cohen offer, if not being superior thereto. The Trustees' plan is a simple one but provides for the sale of the real estate in accordance with the amended Weinraub offer and the creation of a creditors' cash fund, for distribution as provided in the plan. The plan complies with the provisions of Section 216 of the Bankruptcy Act. It is fair, equitable and feasible.

Preston House Sire Plan, Inc. is insolvent in that the aggregate of its property, exclusive of any property which it may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay its creditors, is not at a fair valuation sufficient in amount to pay its debts. The holders of preferred and common stock of the debtor issued and outstanding have no interest in the assets of the debtor and shall not participate under the plan.

The plan of reorganization submitted by the Trustees herein and notice of a hearing on which was given to creditors, stockholders and other parties in interest by notice dated October 13, 1964, as amended to incorporate the amended Weinraub offer, is approved. However, since the reorganization petition was filed herein on February 16, 1963, the plan of reorganization cannot be confirmed within two years from that date, and the Trustees are directed to take appropriate action to contest the validity of the consolidated third mortgage prior to February 16, 1965, in order to protect the interests of this estate in the event the plan of reorganization is not confirmed and consummated. Any action taken by the Trustees to con-

test the validity of such mortgage will become moot if the Trustees' plan of reorganization, incorporating the amended Weinraub offer, is confirmed and consummated. The Trustees are also directed to take similar action in respect of the consolidated second mortgage if they deem such action appropriate in the circumstances.

This decision shall constitute the Court's findings of fact. Attached hereto is the following correspondence which is hereby made a part of this decision:

Letter dated November 19, 1964 from Charles I. Pearson, Esq., to the Court;(*)

Letter dated November 25, 1964 from Leonard Cohen, Esq. to the Court;(*)

Letter dated November 27, 1964 from Albert Mintzer to the Court accompanying letter dated November 25, 1964 from Mr. Pearson to Mr. Mintzer;(*)

Letter dated December 28, 1964 from Charles Seligson, Esq. to the Court;(*)

Letter dated January 7, 1965 from Leonard Cohen, Esq. to the Court;(*)

Letter dated January 7, 1965 from Charles Seligson, Esq. to the Court;(*)

Letter dated February 2, 1965 from Charles Seligson, Esq. to the Court.(*)

The Trustees are directed to return the deposits received by them in connection with the Cohen and Mitchell offers. They are further directed to retain the deposit received in connection with the Pearson offer, pending appropriate proceedings with respect thereto.

(*) See Record.

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Settle order of approval on notice to the Securities and Exchange Commission, Charles I. Pearson, Leonard Cohen, Levy, Murphy and Stolz, Esqs., Albert Mintzer and the East New York Savings Bank.

s/ SIDNEY SUGARMAN

United States District Judge

Dated: New York, New York
February 8, 1965